

***United States Court of Appeals
for the Second Circuit***



**RESPONDENT'S
BRIEF**

77-4121

NO. 77-4121

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

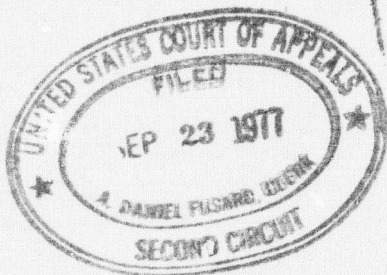
NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MILGO INDUSTRIAL, INC.,
Respondent.

ON APPLICATION FOR ENFORCEMENT OF AN
ORDER OF THE NATIONAL LABOR RELATIONS
BOARD

BRIEF FOR RESPONDENT
MILGO INDUSTRIAL, INC.



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TABLE OF CONTENTS

Counterstatement of the Issues Presented.....	1
Counterstatement of the Case.....	2
Summary of the Employer's Position.....	3

POINT I

The Board's Finding That the Employer Violated Sections 8(a)(1) and 8(a)(5) of the Act is not Supported by Substantial Evidence on the Record as a whole.....	4
A. Substantial Evidence Viewing the Record as a whole, Illustrates that the Employer did not Unilaterally Delay or Cut Short the Negotiating Sessions.....	4
1. The Employer did not unlawfully delay negotiations prior to the 10(b) period.....	5
a. The commencement of negotiation.....	6
b. The remaining pre-10(b) period meetings....	7
c. Summary of the pre-10(b) period.....	12
2. There is no evidence of Employer delay in the negotiations that took place during the 10(b) period.....	14
a. The 10(b) period negotiations.....	14
b. A summary of the negotiations conducted during the 10(b) period.....	17
B. The Employer Fully Complied with Each and Every Union Request for Information.....	20
C. The Company Bargained in Good Faith as Evidenced by Its Proposals and Concessions.....	27

POINT II

The Board's Conclusion That the Employer Violated Sections 8(a)(1) and 8(a)(5) of the Act is Contrary to Court and Board Precedent.....	32
---	----

A. The Lack of Substantial Evidence is Clear.....	32
B. The Events Prior to April 1, 1975 Establish That the Company was Engaged in Good Faith Bargaining....	33
C. Negotiations That occurred After April 1, 1975 Establish That the Company was Engaged in Good Faith Bargaining.....	37
CONCLUSION.....	39

TABLE OF CASES

ALCAN ALUMINUM CORP., 214 NLRB No. 35 (1974).....	35
ALKAHN SILK LABEL CO., 193 NLRB 167 (1971).....	36
BORG-WARNER CONTROLS, 198 NLRB 726 (1972).....	35
CARTRISEAL CORP., 178 NLRB 272 (1969).....	34
FREEMAN CO., 194 NLRB 595 (1971).....	37
HOLMES TYPOGRAPHY, 218 NLRB No. 64 (1975).....	35
INTERPOLYMER INDUSTRIES, INC., 196 NLRB 729 (1972).....	36
LOCAL LODGE NO. 1424 v. NLRB, 362 U.S. 411 (1960).....	5, 33
M. R. & R. TRUCKING CO., 434 F. 2d 689 (5th Cir. 1970).....	37
NEWHOUSE BROADCASTING CORP., 197 NLRB 885 (1972).....	36
NLRB v. MARTIN A. GLEASON, 534 F. 2d 466 (2d Cir. 1976)....	14
NLRB v. MEXIA TEXTILE MILLS, INC., 339 U.S. 563 (1950).....	37
TEXAS INDUSTRIES, INC., 140 NLRB 527 (1963).....	12
UNIVERSAL CAMERA CORP. v. NLRB, 340 U.S. 474 (1951)14, 20, 20n, 32	
WAYCROSS JOURNAL-HERALD, INC., 157 NLRB 1486 (1966).....	36

TABLE OF STATUTES

NATIONAL LABOR RELATIONS ACT -

National Labor Relations Act, as amended, 29	
U.S.C. Sections 151, et seq.....	2
Section 8(a)(1).....	2,3,4,27,28,31,33
Section 8(a)(3).....	2
Section 8(a)(5).....	2,3,4,27,28,31,33,34
Section 8(d).....	34
Section 10(b).....	5,6,7,12, ,34

ADMINISTRATIVE PROCEDURE ACT -

Administrative Procedure Act, 5 U.S.C. Section 551, et seq.	
Section 706.....	32

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BRIEF FOR RESPONDENT
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COUNTERSTATEMENT OF THE ISSUES PRESENTED

1. Is the Board's finding that the Employer unilaterally delayed or cut short the negotiating sessions supported by substantial evidence on the record as a whole?
2. Is the Board's finding that the Employer did not comply with union demands for information supported by substantial evidence on the record as a whole?
3. Is the Board's finding that the Employer did not evidence good faith in its contract proposals and/or concessions supported by substantial evidence on the record as a whole?

COUNTER STATEMENT OF THE CASE

Milgo Industrial, the Respondent herein, produces, sells and distributes metal construction items and related products (A. 632). It employs approximately 19 employees (A. 816).

On October 1, 1975, Shopmen's Local Union No. 455, INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRON WORKERS, AFL-CIO, (hereinafter "Local 455" or "the Union") filed certain charges with the National Labor Relations Board alleging the commission by the Employer, MILGO INDUSTRIAL, INC., of certain unfair labor practices in violation of Sections 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, 29 U.S.C. Sections 151, et seq. (hereinafter "the Act").

The Regional Director declined to issue a complaint on the 8(a)(3) allegation. However, on December 31, 1975, a Complaint and Notice of Hearing issued alleging that the Employer had violated Section 8(a)(1) and (5) of the Act by negotiating with the Union in bad faith. The matter was held before Administrative Law Judge Paul E. Weil (hereinafter "the Judge") on March 29, 30 and 31 of 1976 who found that the Employer had violated Section 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith with the Union. A panel of the Board affirmed his rulings, findings and conclusions.

SUMMARY OF THE EMPLOYER'S POSITION

The Board erroneously found that the Employer had violated Sections 8(a)(5) and 8(a)(1) of the Act. It is respectfully submitted that the bases on which the decision rested cannot support such a conclusion.

According to the Board, the Employer failed to meet and bargain at regular intervals (A. 643). 1 / It is submitted that contrarily, the record evidence as a whole, illustrates that the Employer did not unreasonably delay in meeting with the Union. It is both parties who must be blamed for the slow course of bargaining if either must be.

Further, the Board rested its findings on failure to furnish the Union with certain information (A. 644). Rather, substantial evidence on the record as a whole shows that every request for information was satisfactorily met.

Lastly, the decision rested on a finding that the Employer had unlawfully refused to agree to certain Union language proposals (A. 642). A careful review of the Record indicates that the Employer consistently maintained a flexible posture and continued to make concessions to the demands of the Union throughout the negotiation process. Substantial evidence viewing the record as a whole can support no other conclusion.

1 / References contained in parentheses are to the Joint Appendix herein.

POINT I

THE BOARD'S FINDING THAT THE EM-
PLOYER VIOLATED SECTIONS 8(a)(1)
AND 8(a)(5) OF THE ACT IS NOT
SUPPORTED BY SUBSTANTIAL EVIDENCE
ON THE RECORD AS A WHOLE.

As noted, the Board relied on certain bases in finding the Section 8(a)(1) and 8(a)(5) violations. Factor one was its finding that the Employer engaged in delaying tactics and was responsible for the failure of the parties to meet at regular intervals. Factor two was a finding that the Employer made agreement virtually impossible by maintaining an inflexible posture and by making too few concessions. Lastly, reliance was placed on the Employer's alleged failure to furnish the Union with a copy of the Company's welfare plan and failure to present the Union with cost information on its own pension plan.

It is respectfully submitted that not one of these findings is supported by substantial evidence on the record considered as a whole. As these are the factors upon which the Board rested its Order, the Employer respectfully requests that the Board Order be set aside and that enforcement of the Board Order must therefore be denied by this Court.

A. Substantial Evidence Viewing The Record As A Whole,
Illustrates That The Employer Did Not Unilaterally
Delay Or Cut Short The Negotiating Sessions.

The Board, in finding a violation of the Act, implied that each and every negotiation session was of short duration because the Employer was unwilling to spend the amount of time

necessary to properly negotiate an agreement. According to the Board, throughout the negotiations, the Employer's chief negotiator was too busy to give the negotiations his full attention. By improperly crediting the General Counsel's sole witness, Mr. William Colavito, the Board further found that the Union continually asked for expedited negotiations in the form of more frequent and longer bargaining sessions.

It is respectfully submitted that these findings and conclusions are not supported by substantial evidence when one carefully reviews the entire record. An examination of the course of negotiations both before and after the 10(b) period shows no lack of good faith bargaining by the Employer. 2 /

1. The Employer did not unlawfully delay negotiations prior to the 10(b) period.

The Board, in adopting the Administrative Law Judge's findings, found, in summing up the period prior to April 1, 1975, that only 11 negotiating meetings had occurred in the 8 1/2 months since this Court had ordered the Employer to bargain. These "delays" in meaningful bargaining were held to be attributable to the Employer (A. 643-644).

2/ April 1, 1975 is the date which marks the beginning of the 10(b) period as the charge was filed on October 1, 1975. Section 10(b) of the Act provides that "No complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board." Conduct occurring more than six months prior to the filing of the unfair labor practice can only be considered for the limited purpose of shedding light on events within the 10(b) period which are alleged to have violated the Act. Local Lodge No. 1424 v. NLRB (Bryan Manufacturing Company), 362 U.S. 411 (1960).

Contrarily, a careful review of the entire record before this Court reveals that before the 10(b) period, there was in fact, no delay in that time frame which could properly be deemed the responsibility of the Employer.

a. The commencement of negotiations.

The Union had notified the Employer of its desire to begin negotiations by letter dated July 1, 1974 (A. 651). However, because the Employer's operations were shut down during the first two weeks of July, the Employer was not aware of the letter until the middle of July (A. 535-536). Thereafter, upon the Company's reopening, Bruce Gitlin, the Vice-President of the Company, called his labor counsel, David Tolmach, to advise him of receipt of the Union's letter. The Union's letter was forwarded to Mr. Tolmach, and on July 24th, Mr. Tolmach wrote to Mr. Colavito, the President of Local 455, requesting the Union to contact him in order to arrange a mutually convenient date (A. 652). As Mr. Tolmach did not receive the Union's initial bargaining request until after the middle of July, the July 24th response was certainly reasonable and is not, contrary to the Board's findings, evidence of delay.

Thereafter, telephone calls were exchanged pursuant to Tolmach's letter of July 24, 1975 and a meeting was arranged for August 8, 1974 in Mr. Tolmach's office. 3 /

3 / Meetings at the attorney's offices were arranged by mutual desire as both the Company facilities and the Union facilities were inadequate (A. 411-412).

At this first negotiating session, the meeting was delayed for one hour because of Colavito's late arrival (A. 538). At the end of this meeting, Mr. Tolmach requested adequate time to review the proposed contract which the Union had presented them at this meeting. Therefore, no date was set for a second meeting. 4/

Less than two weeks later, Mr. Colavito called Mr. Tolmach's office and Mr. Tolmach returned the phone call on the following day, August 20, 1974 (A. 541). Because Mr. Tolmach had a vacation scheduled for the first week of September, the two gentlemen agreed to hold a second meeting after Labor Day on September 9th. 5/

b. The remaining pre-10(b) period meetings.

The September 9, 1974 meeting was attended by Mr. Tolmach, and Mr. Gitlin for the Company and by Mr. Joseph Schifano and Mr. Colavito for the Union (A. 56). At this meeting, the parties received the Union's proposals in their entirety and engaged in considerable discussion. After the parties had discussed all of the Union's proposals, it was

4/ While Mr. Colavito initially testified that he had requested a date certain for the next meeting only to be told by Mr. Tolmach that "he was a very busy guy" (A. 42), Mr. Colavito later confessed that such a remark may not have been made (A. 390).

5/ While Mr. Colavito had initially referred to a letter that he had allegedly sent to request expedited meetings upon learning of the September 9th date (A. 44), he later admitted that no such letter had been sent after both he and the General Counsel were unable to produce such a document (A. 391-392).

mutually agreed to end the meeting and to meet again on September 20th (A. 549). 6/

The parties met again on September 20th, 1974. This meeting ended quickly as Mr. Colavito wanted time to review the Company's proposals. He stated that "he would have to get to his attorney to review the language and he would get back to (Tolmach) to set up the next meeting." (A. 553). 7/

Approximately one week after the September 20 meeting, Calavito called Tolmach and they agreed to meet again on October 7, 1974 (A. 554). By 5:00 or 5:30 P.M. on October 7th, the parties had finished their discussion of the proposals for that day. By mutual agreement the meeting concluded and October

6/ Mr. Colavito's testimony was replete with inconsistencies. While testifying on direct, the gentleman had stated that the meeting ended early because both Mr. Gitlin and Mr. Tolmach had to beat the traffic. However, on cross-examination, upon being confronted with his affidavit which was devoid of any such mention, he conceded that the meeting had ended upon the mutual agreement of the parties (A. 410-411). It is submitted that viewing the record as a whole, substantial evidence cannot support the Board's crediting of Mr. Colavito's testimony.

7/ As further evidence of Mr. Colavito's unreliability as a witness, one must note that not only did he fail to remember cutting the meeting short after receiving the Company proposals, he also cannot recall the meeting itself (A. 100, 416).

17th was agreed upon as the date for the next session (A. 557). 8/

The October 17, 1974 meeting began at approximately 2:00 P.M. and lasted about three to three-and-a-half hours. November 4, 1974 was mutually agreed upon for the next meeting (A. 559). 9/

8/ It is important to emphasize that Mr. Colavito, throughout his entire direct examination, maintained that each meeting ended early because either Mr. Gitlin had to "beat the traffic" or Mr. Tolmach had "a headache or stomachache." (A. 423) However, during his cross-examination, Colavito was unable to testify with particularity as to how any of the meetings ended. In fact, on cross-examination, Colavito admitted breaking off one meeting (A. 423). When confronted with his calendar, he admitted a second such incident (A. 476-477). Tolmach's uncontroverted testimony discloses that he had informed Colavito that he was prepared to meet for as long as the Union desired (A. 556). Additionally, even Colavito admitted that Tolmach had authority to negotiate without Gitlin being present (A. 413). Therefore, Colavito's statement that meetings were ended because of Gitlin's desire to beat the traffic is completely without merit. Tolmach readily admitted that on one occasion he was feeling ill and ended a meeting (A. 580). Apparently, Colavito utilized this one instance to embellish his testimony.

9/ Further evidence of Mr. Colavito's confused and misleading testimony is found in his statement, during direct examination, that when he requested earlier and quicker meetings, he was told by the Company that they would only do what "They had to do by law". (A. 142) However, during cross-examination, it became apparent that the true origin of this remark had nothing to do with the Company's attitude toward the negotiation process:

"Q. (By Mr. Kaufman) On November 4, 1974, did Mr. Tolmach ever tell you he would only negotiate as to those items which the law required him to?

A. (By Mr. Colavito) No. There was remark about the law really from Gitlin in terms of we asked for some humane approach to some problems and he said I will only do what the law forces me to do. But -

Q. What problems were those?

A. I don't remember now. It may have been with the firing of an employee."

The parties subsequently met again on November 4, 1974 and November 12, 1974. Both meetings were held in the afternoon and both dates were mutually agreed upon. At the end of the November 12th meeting, Mr. Colavito suggested a morning meeting and, accordingly, the next session was set for 9:00 A.M. on November 22, 1974 (A. 562, 564).

The meeting of November 22, 1974, began at 9:00 A.M. 10/ At the conclusion of this meeting, Tolmach told Colavito that in the previous two months of negotiations they had covered a great deal of ground and Tolmach suggested to Colavito that he (Tolmach) submit a second set of proposals, incorporating the agreed upon changes. Colavito concurred (A. 566). Tolmach told Colavito that he hoped to have the revised proposals completed by the third week in December 1974 (A. 567). However, prior to the third week of December, Tolmach called Colavito and told him that he would be late with the revised proposals. Colavito voiced no objection (A. 567). 11/

On January 7, 1975, Mr. Tolmach, as promised, mailed the revised proposals to Colavito with a request that Colavito

10/ Mr. Colavito, on direct examination, had "guessed" that the meeting started "around" 2:30 P.M. (A. 172). However, on cross-examination he altered his testimony to admit that the November 22nd meeting had, in fact, been a 9 A.M. meeting (A. 458).

11/ At first, Mr. Colavito had alleged that within a week to a week-and-a-half of the November 22nd meeting, he called Mr. Tolmach three or four times (A. 179-181). Then, when he received no reply, he stated that he sent a letter to Mr. Tolmach (A. 181). However, upon cross-examination he was forced to concede that no letter had been mailed (A. 460) nor had any phone call been made until the third week (A. 459).

call to set up a new meeting (A. 461, 783). Nothing was heard from the Union until the end of January. Finally, on January 29, 1975, Colavito called Tolmach and February 14th was briefly discussed for the next meeting (A. 570). On February 3, 1975, Tolmach sent a letter to Colavito again discussing the 14th as a possible meeting date (A. 571, 730). The two men talked again on February 3rd and agreed to meet on February 14, 1975, although there was some question whether either could make it on that date (A. 570). Just prior to the scheduled meeting on February 14th, Tolmach told Colavito that he would be quite late for the meeting and asked if he would prefer a meeting the following week, suggesting February 18th or 19th (A. 571). Colavito was unable to attend on either the 18th or 19th (A. 470, 571). They then discussed February 28th or March 3rd and mutually agreed on March 3rd for the next meeting (A. 571).

The meeting of March 3, 1975 was also a morning meeting and began at 10:00 A.M. with Mr. Tolmach and Mr. Colavito present (A. 572). The meeting lasted four (4) to five (5) hours (A. 576) and broke up because Mr. Colavito had a 4:30 appointment and because "it was agreed that we had exhausted our discussion for that day" (A. 476). The parties agreed to meet on March 14, 1975.

The parties did meet on March 14, 1975 and again the meeting ended only when both parties had agreed that they had "had enough for the day." (A. 306).

However, on March 26, 1975, a short meeting was had due to Mr. Tolmach's not feeling well (A. 580). Therefore, no meeting was set prior to the conclusion of the particular session. However, a later phone call confirmed an April 18, 1975 meeting date.

c. Summary of the pre-10(b) period.

The opening bargaining session was held in August, 1974. Over the next four months, the parties met a total of eight times.

The totality of the Employer's conduct during this time period clearly indicates a desire to engage in good faith bargaining. Eight meetings in four months cannot be deemed irregular or sporadic bargaining. 12/

The only significant gap in the bargaining in the period before April, 1975 was the one that occurred from November 1974 to March 1975. This hiatus is easily explained and the responsibility for this break does not rest entirely on the Respondent's shoulders.

It has been seen that by November of 1975, the Union and the Company had exchanged numerous contract proposals. It was suggested by Mr. Tolmach that these proposals be reduced to writing. The Union agreed and this integration was to be ready by the third week in December, 1974. However, prior to the date set, it was agreed that the proposals could be sub-

12/ See Texas Industries, Inc., 140 NLRB 527 (1963) where 11 meetings in four months was held to be frequent enough to satisfy the Act.

mitted in early January. On January 7th, the Respondent mailed the revised proposals to the Union and asked that the Union call to set-up the next meeting. The Union did not contact Mr. Tolmach until January 29, 1975.

During early February, the parties suggested alternate dates for further negotiations. As Mr. Tolmach would have been late for the February 14th date, he suggested the 18th or 19th of that month. Mr. Colavito could not make it on either date and the parties finally agreed upon March 3, 1975.

This three month period can only be deemed delay on the part of the Company if one ignores the record. December was a month that was mutually set aside as one for the preparation of the integrated proposals. January's lack of negotiations can only be attributed to the Union as Mr. Tolmach's letter of January 7th clearly requests Mr. Colavito to call and set up a new meeting date (A. 461, 783). The lack of meetings in February can, in part, be attributed to both parties since certain dates were unacceptable to both.

It should be noted that once the parties began negotiations again (in March, 1975) they held three long negotiating sessions. In fact, the only meetings voluntarily cut short during this entire period were the ones held on September 20, 1974 and March 3, 1975 and these were halted by Mr. Colavito and not by the Company Representatives.

A review of the entire record firmly establishes that substantial evidence on the record as a whole cannot support the Board's findings that the Employer bargained in bad faith from the commencement of negotiations. 13/

2. There is no evidence of Employer delay in the negotiations that took place during the 10(b) period.

- a. The 10(b) period negotiations.

After March 26, 1975, the parties subsequently met on April 18, 1975. At the close of that meeting, May 2, 1975 was agreed upon without protest from Mr. Colavito, as the next session date (A. 584).

The parties did meet on May 2, 1975 and negotiated for 3 or 4 hours. Again, at the conclusion of the meeting, the parties agreed to meet again. This time the agreed upon date was May 9, 1975. 14/

The May 9, 1975 meeting was called off because Mr. Colavito had oral surgery. 15/ Shortly thereafter, Mr. Colavito

13/ While the right to draw inferences is generally within the domain of the trier, that power is not absolute. It is the function of the reviewing Court to scrutinize the record and set aside a decision of the Board where it is based on unreasonable inferences unsupported by the record considered as a whole. NLRB v. Martin A. Gleason, 534 F.2d 466, 474 (2d Cir., 1976); Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951).

14/ On direct, Mr. Colavito had testified that he had protested both the pace of negotiations at the May 2nd meeting and his difficulty in securing morning meetings (A. 328). On cross-examination, Mr. Colavito could not recall making any such remarks (A. 491). The Board, through its affirmance of the Administrative Law Judge's findings, has credited Mr. Colavito's testimony on direct as if it were uncontradicted.

15/ Colavito insisted that it was Mr. Tolmach who cancelled the meeting, even in the face of his affidavit (A. 372-374) and his notes of the meeting (A. 375) which both state that Colavito, himself, called off the meeting.

and Mr. Tolmach agreed in a telephone conversation to meet on May 20, 1975, the next mutually convenient date. However, the May 20th meeting was also cancelled by Mr. Colavito (A. 493, 587). 16/

The parties met again on May 29, 1975. At the end of this meeting, Mr. Colavito told Mr. Tolmach that he was going to be tied up with negotiations with the Association (A. 591). However, the parties nonetheless agreed to meet again on June 19, 1975.

On June 19, 1975, Tolmach was at his office at the agreed upon time. Mr. Schifano arrived and the two men waited an hour, finally Schifano received a phone call from Mr. Colavito and cancelled the meeting (A. 591-592). 17/ In a telephone conversation that followed the abortive June 19, 1975 meeting, Tolmach and Colavito agreed to meet on July 11, 1975.

16/ Colavito testified that it was this meeting and not the May 9th meeting that he cancelled because of oral surgery despite his own negotiating notes and his affidavit. Certainly such inconsistency, whether it be attributable to poor memory or inept recordkeeping, casts grave light on the value of his recollections and the weight which was erroneously placed on his testimony.

17/ Mr. Colavito's version of the events of June 19th was confused and contradictory. According to him, Mr. Tolmach had "called the office early on the 19th and Tony Schifano went to that meeting... He was told the meeting was off...I called later on and I told him I just got word that the company called the meeting off that morning." (A. 338-339) If the meeting had been called off as Colavito testified, why then should Schifano appear at Tolmach's office at the appointed time? In fact, Colavito testified that Schifano expected him in Tolmach's office (A. 498). After Colavito received the message, he claims he spoke to Tolmach, "Dave, I understand the meeting was called off, let's arrange another meeting." What could be more incredible in the face of both Mr. Tolmach and Mr. Schifano's patient hour wait at Mr. Tolmach's office then to have Mr. Colavito call from another negotiating meeting to tell them that he had heard that the meeting was called off! (A. 498).

The July 11, 1975 session began at 2:00 p.m. and was attended by Mr. Tolmach as well as Mr. Colavito. However, because both individuals had other engagements that evening, the meeting lasted only until 5:15 p.m. (A. 503, 594). At sometime after July 11th, the parties agreed to meet again on July 24, 1975 (A. 595).

Unfortunately, the July 24th meeting had to be cancelled because Mr. Tolmach was involved in a meeting that lasted beyond the scheduled time. Mr. Tolmach left a message with Mr. Colavito's office, however, the message was not received before the latter arrived at the meeting (A. 595). Mr. Colavito then called Mr. Tolmach who apologized for the mix-up (A. 595). No new date was arranged at that time (A. 595). Tolmach was away on business during the first week of August, but prior to leaving tried unsuccessfully to reach Colavito (A. 596). During the same period of time, Colavito apparently tried to contact Tolmach, but was likewise unsuccessful (A. 596). The parties exchanged correspondence during this period (A. 596-597, 731, 732). Tolmach, in his letter (A. 732), suggested September 3rd as the next meeting date (A. 597). Colavito was unavailable on September 3rd and suggested September 11th, which was mutually agreeable (A. 343).

Special emphasis must be placed on the Board's finding that Mr. Colavito could "have spent multiples of the amount of time negotiating" than was made available to him (A. 643). Certainly, the above uncontroverted testimony belies this finding.

Substantial evidence viewing the record as a whole proves that Mr. Colavito was very busy during the 10(b) period and could not have met with Mr. Tolmach on a more regular basis than was achieved.

The September 11, 1974 meeting was held at 2:00 P.M. Little was discussed because Mr. Colavito got up and left the meeting. Mr. Colavito said nothing at this session about long delays in bargaining (A. 598). Certainly, unilaterally leaving a bargaining session is as incompatible with good faith bargaining as it is with Mr. Colavito's "avowed" concern for longer bargaining sessions.

Shortly thereafter, the parties agreed to meet on September 29th. However, Mr. Colavito was forced to cancel the meeting at the last moment because of an emergency trustees meeting (A. 348, 507). The meeting was rescheduled for the following day, September 30, 1975.

At the September 30th meeting, Mr. Tolmach explained to Mr. Colavito that a decertification petition has been filed and that he therefore had doubts about the legality of continued bargaining in the face of a decertification petition (A. 600). Tolmach asked that Colavito have his attorney contact him (Tolmach) to discuss the matter further (A. 600). Tolmach heard nothing further from Colavito (A. 600-601).

b. A summary of the negotiations conducted during the 10(b) period.

A Board adopted the Judge's findings that from April, 1975 to September, 1976, the parties only met six times (A. 643).

To the Board, this could "scarcely be said to be regular intervals." Nonetheless, a careful scrutiny of the cancelled meetings, as well as those held, shows that eleven meetings were scheduled within the 10(b) period. While admittedly the Company cancelled the July 24th meeting (A. 595), the Union itself was to blame for the cancellation of the four other meetings. These were the meetings of May 9, 1975 (A. 586), May 20, 1975 (A. 373, 587), June 19, 1975 (A. 591-592), and September 29, 1975 (A. 348, 507). In addition, the Union cut short the September 11, 1975 meeting and was unavailable for a potential meeting on September 3, 1975 (A. 597, 598).

Substantial evidence on the record as a whole cannot support the Board's crediting of Mr. Colavito's expressed desire for more frequent and longer bargaining sessions. Mr. Colavito had admitted his unavailability both because of his deep involvement in negotiations with the Association throughout the Summer of 1975 (A. 367, 506-512) as well as his "extensive" involvement in the strike situation which resulted therefrom (A. 369). 18/

While the Board adopts the Judge's findings that Mr. Colavito's pocket calendar showed that he could have spent a great deal more time negotiating than was actually spent (A. 643), it is respectfully submitted that such a finding does not rest on substantial evidence viewing the record as a whole. We

18/ The negotiations for the Association contract commenced in the "second or third week of June" (A. 367). Thereafter, strikes kept Mr. Colavito "extensively" involved throughout "July, August, September and October of 1975" (A. 368, 369).

urge this Court to view Mr. Colavito's pocket calendar and compare it to the testimony of both witnesses.

Additionally, the Board through the Judge's findings, places great reliance on the fact that Mr. Tolmach was out of town 2 or 3 days in every week. It is respectfully submitted to this Court that such reliance is misplaced. If one is out of town for 2 or 3 days every week, one is also in town for 2 or 3 days every week. It is through this perspective that the meetings that were cancelled by the Union as well as its alleged requests for frequent and longer bargaining sessions must be viewed.

The Judge's finding, also adopted by the Board, that "on two occasions during the 10(b) period, more than a month elapsed between negotiating sessions" must be looked at employing a similar perspective. The finding that this delay was attributable to the Company because Mr. Colavito was "forced to take whatever dates Tolmach said he would be available" has no basis in the record as a whole. It is true that partial responsibility for the two month long lapses in bargaining can be blamed on the Company. One was, after all, the result of its July 24, 1975 cancellation. However, the long gap between May 29th and July 11th was the Union's doing and not the Company.

Delay by the Employer during the 10(b) period must be established by substantial evidence on the record as a whole viewing all the evidence, including the contrary evidence. It

is respectfully submitted that a review of the entire record cannot support the finding that the Company failed to meet with the Union at regular intervals or was solely responsible for the pace of negotiations during this period.

B. The Employer Fully Complied With Each And Every Union Request For Information.

The second basis for the Board's finding of an 8(a)(5) violation was the Employer's withholding of certain information which was supposedly repeatedly requested by the Union. It is submitted that this finding finds inadequate support when one views the entire record and applies the Universal Camera standard as enunciated by the Supreme Court. 19/

At different times over the course of negotiations, the union requested such items as; the company welfare plan, the cost of such plan, the company pension plan and its cost, the company sick leave policy, the company's job operations and classifications, the names, addresses and starting dates of the company employees, the names and addresses of all new employees, the rates of pay of all employees, the amount of bonuses paid since 1971 and a list of all other company fringe benefits. A careful examination of the entire record reveals that the company fully complied with each and every union request.

The Board too, in adopting the Judge's decision, recognized the Company's compliance on these requests and based its adverse finding solely on the omission of two items: the alleged failure of the Company to provide the Union with a copy of its

19/ 340 U.S. at 487-88. See page 32 supra.

health and welfare plan as well as the alleged failure of the Company to update the costs of its pension plan in terms of recent changes in federal law (A. 644).

It is urged that these failures to disclose are not supported by substantial evidence viewing the record as a whole. The union was fully able to discern the benefits of the health plan once it was aware of the coverage the company subscribed to. In addition, the union never requested an update on the costs of the pension plan once its initial request for information was fulfilled in the fall of 1974. On the contrary, the totality of the Employer's conduct, as shown by a careful review of the entire record, illustrates that the Company did not engage in bad faith bargaining. Rather, it fully complied with each and every union request for information relevant to meaningful bargaining.

The first union request for information was contained in the letter dated July 1, 1974 which also requested that a date be set for the commencement of negotiations (A. 651). In that letter the union requested "the names, addresses, starting dates, classifications and rates of pay plus other benefits that were presently in effect" for Milgo Industrial, Inc. employees. After the company's attorney (Mr. Tolmach) received a copy of this letter, he directed Bruce J. Gitlin, a principal in Milgo, to comply with the union requests (A. 536). In a letter dated July 24, 1974, the company forwarded to the union all the infor-

mation requested with the exception of "job classifications" which did not exist at the employer's plant (A. 26, 652-654).

At the first negotiating session, held on August 8, 1974, the Union made no request for information, materials or documents (A. 539). 20/

On August 19, 1974, Mr. Colavito called Mr. Tolmach's office. Tolmach returned the telephone call on the following day and spoke to Mr. Colavito who, for the first time, requested the Company's vacation schedule, pension plan, welfare plan, wage increases for 1971-1974 and job functions (A. 541). This information Tolmach turned over to the Union at the negotiating session held on September 9, 1974 (A. 541, 755). Mr. Colavito was given a detailed breakdown of each individual's job duties and Mr. Tolmach explained to him that Milgo Industrial had no classification system "and if there was going to be any classification system, that they (the Union) would have to come up with it (A. 543, 893).

20/ Mr. Colavito's testimony on this point was most contradictory. At first he claimed that he requested certain information which had not been included in Mr. Tolmach's July 24, 1974 response, that is, job operations and classifications, wage increases since 1971, copies of the Company's welfare and pension plan and their costs (A. 34), a breakdown of holidays (A. 35), information on bonuses (A. 36), and the Company's sick leave program (A. 36). Nonetheless, during cross-examination, Mr. Colavito admitted that he was confused as to what really happened at the first meeting and was unable to recall the events he testified to during direct. In fact, he conceded that information about individual job descriptions "was given to me once, we went over man by man and the Company verbalized in terms of what each man did" (A. 397), but that it "was possible" that this detailed explanation of classifications took place at the second meeting on September 9, 1974 (A. 398). As to the purported request for bonus information, the gentleman's affidavit detailed that the first time he requested bonus information was at the March meeting. This is but one more instance of the egregious error both the Board and the Judge made by crediting Mr. Colavito's account of the negotiations.

At this meeting the union made no request for information on the Employer's bonus or sick leave policies (A. 548, 549). Also discussed during the meeting was the Employer's current pension plan (A. 734-754). Colavito was given a copy of the pension trust agreement (A. 543-44). Tolmach also gave Colavito the name, as well as the costs, of the welfare plan (A. 400-401). According to Mr. Tolmach, the Union representative did not request a copy of the plan or raise any questions about the coverage (A. 545). 21/

21/ By Mr. Colavito's own admissions, by the September 9th meeting, he had been given detailed explanations of job operations, job classifications, pension benefits and welfare benefits (A. 400-404). He had already been notified of the Company's welfare plan when he was given the name of the plan (A. 402) and he was told of the cost (A. 97, 402). Interestingly, on direct examination, he failed to remember whether he had been given the cost of the pension program (A. 97). However, on cross-examination, he admitted begrudgingly that he had received this information:

- "Q. ...Did you receive the welfare costs on September 9?
- A. I don't remember. It was in the early stages of the negotiations we received some welfare costs on the present plan they had. We might have gotten some pension costs too at that stage of the game.
- Q. So you received welfare costs and pension costs; is that your testimony?
- A. At that stage of the game.
- Q. At that stage of the game?
- A. Yes.
- Q. And, did the Company tell you they had the Executive Blue Cross Plan?
- A. Yes, they did.
- Q. And didn't they verbally explain to you what the Executive Plan covered?
- A. I don't remember if they did.
- Q. You don't remember if they did?
- A. If they expanded on it, yes. They said call the ---?" (A. 400-401).

In fact, no discussion as to the exact coverage was necessary as a simple telephone call to Blue Cross-Blue Shield would have revealed the details of the plan. Incredibly, it is this information that the Board, through the Judge, finds that the Company unlawfully withheld from the Union:

"Negotiations on Respondent's welfare offer were stultified by the fact that it had never furnished information as to what the benefits were that Respondent was offering..." (A. 642).

Thus, the union's failure to inquire of Blue Cross as to what benefits were afforded by the Executive Plan is termed evidence of the Company's bad faith bargaining. Such a finding is totally unsupported by substantial evidence viewing the record as a whole, particularly because the union could not even remember if the Company had explained the Plan's benefits. (A. 400-401).

At the negotiating session which was held on September 20, 1974, Mr. Tolmach again gave Mr. Colavito the specific name and cost of the Employer's Blue Cross-Blue Shield plan (A. 551). In addition, he provided Mr. Colavito with a copy of the Employer's pension trust agreement and its cost (A. 551). Mr. Colavito made no request for additional information about the pension plan and did not ask that the plan be updated in terms of ERISA (A. 553-554). Furthermore, at the November 4, 1974 bargaining session, the Company broke down the costs for both the pension

and welfare plans into hourly figures (A. 561). 21/

On November 1, 1974, the union was also given the cost of the Employer's vacation plan (A. 163). No request was made for further information on job tasks at the November 12th meeting. 22/

During the course of the March 3, 1975 meeting, Mr. Colavito requested the names and addresses of all the new employees, bonus information and again asked for job functions (A. 572). This was the first time that Colavito had requested a list of new employees hired after August, 1974 and was the first request for bonus information. It was also the first time since the September 9, 1974 meeting that Colavito asked for job descriptions (A. 572-573). In response to his last request, Tolmach gave Colavito a copy of the job descriptions that Gitlin had read from at the September 9 session (A. 573, 893). The Employer gave the information requested at the March

21/ Contrarily, Mr. Colavito erroneously claimed to have requested the same information which he later admitted he had already been given. "The Blue Cross-Blue Shield, we had not gotten a copy of the program that the Company had on its welfare..." (A. 156); "We always asked for the pension cost" (A. 156); "We ask for the information on classifications, the...and the job operations of the employees" (A. 156); "We asked for a copy of welfare and pension... welfare material" (A. 156). Colavito's notes, however, did not reflect that he had made any requests for this information (A. 879). Furthermore, on cross-examination, he could not recall whether such requests had been made (A. 431).

22/ Colavito claims to have "pressed the Company again for the information so we could make an offer that would deal with a classification system..." (A. 156, 165). Colavito was again repeating a request for information he already had (A. 408), for a plan he had already been told he should formulate. Finally, Colavito's notes contained absolutely no mention of job tasks having been discussed at this meeting (A. 455).

3 session to the Union at the March 14, 1975 meeting (A. 577). At this latter meeting, Colavito made no requests for pension costs, welfare costs or the welfare booklet (A. 577-578).

At a short meeting held on March 26, 1975, Mr. Colavito requested the Employer's sick leave policy and was told that there was none (A. 581). He then received further information on the new employees that had been requested at the March 14th meeting (A. 581-582). Mr. Colavito made no request for welfare or pension information at this meeting (A. 582).

The meetings that took place in April and May of 1975 were similar in that Mr. Colavito made no requests for the welfare plan or the pension plan costs (A. 583-584, 590). 23/ Similarly, there was no request for such information made at the September 11, 1975 bargaining session (A. 598). While Mr. Colavito testified that he often asked for the Employer's sick leave policy, it is clear from the record viewed as a whole that the Company did not have a sick leave policy (A. 333, 494). 24/

23/ Despite the fact that neither his notes (A. 877-883), nor his affidavit (A. 873-874) made mention of his having requested the same at the April session, Mr. Colavito continued to insist that he had (A. 486-487).

24/ Mr. Colavito himself testified that he was told that the sick leave policy "was one of where a guy wasn't a goof off they got paid for some sick days" (A. 333). One could not find a better definition of "no sick leave policy." Mr. Colavito also testified that the Company had promised to make a proposal on sick leave at the May 29th meeting (A. 333). However, it is clear that the gentleman was unable to testify about negotiating meetings without reliance on his bargaining notes (A. 330). The bargaining notes do not reflect a discussion of sick leave and, in fact, on cross-examination, Colavito indicated that the Company never made this promise at the meeting (A. 495-496).

In conclusion, substantial evidence on the record as whole shows that the Company fully complied with all of the Union requests for information. It is clear that the Company turned over all the job classifications and job task information that it had in its possession. It further promptly supplied the Union with the names and addresses of all of the employees, data concerning employee turnover, data pertaining to wage increases and bonuses, and the fact that the Company had no sick leave policy. In view of its compliance with these requests, it is absurd to view the Company as having refused to disclose any information on the welfare plan or on the costs of its pension plan. The welfare plan and its contents were readily available to Mr. Colavito and he admitted as much on cross-examination (A. 402). The same can be said for the costs of the pension plan (A. 487). Thus, a careful examination of the entire record evidence reveals that each and every Union request for information was fully and promptly complied with by the Company. Therefore, substantial evidence requires that this basis for the 8(a)(1) and 8(a)(5) finding of a failure to bargain in good faith must also fail.

C. The Company Bargained In Good Faith As Evidenced By Its Proposals And Concessions.

The Board, in accepting the Judge's finding that the Employer did not evidence good faith in its contract proposals and/or its concessions, disregarded substantial evidence on the record as a whole. In effect, the Judge had found that an

Employer violates Section 8(a)(5) and 8(a)(1) of the Act if he refuses to accept proposed union language and instead proposes other language and offers to bargain. This finding exceeds the Board's prior rulings on the Employer's obligation to bargain and contravenes the purpose of Section 8(d) of the Act. 25/

The union proposed contract language on a take it or leave it basis and refused to modify its position. On the other hand, as all the evidence shows, throughout the course of negotiations, the Company consistently sought to reach a common ground with the union on contract language. The Company, on September 20, 1974, submitted to the union a set of proposals which was based on and responsive to a major portion of the union's initial demands (A. 894-918). In subsequent negotiating sessions, the Company continued to maintain a flexible posture and continued to make concessions to the demands of the union. This is evidenced by the sets of proposals submitted to the union in January and May of 1975 (A. 783, 784-834).

25/ Section 8(d) reads in pertinent part as follows:

"to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession...." (Emphasis added)

The Judge found that the parties spent "...their time haggling over non-essential language changes" (A. 641). All this evidences is that the Judge never spent time at the bargaining table. Language issues are most essential and must be resolved before a satisfactory and understandable contract can be achieved.

According to the Judge, "most of the paragraphs in the Union's proposals were by no means exceptional" and therefore the Company unnecessarily required "the expenditure of large amounts of time to thrash out the objections that it raised" (A. 642). One such example is the Union's proposal purporting to be language describing the bargaining unit. The language proposed was so broad in scope that it not only covered the employees in the unit, but it could be interpreted as covering the supervisors, the work that the employee's perform, and the other plants of the Employer. Therefore, the Employer cannot be accused of making inane objections when it countered with bargaining unit language similar to that which the Judge himself used and which is based upon the Regional Director's Decision and Direction of Election (A. 645).

Careful review of the record illustrates that each counter-proposal submitted by the Company was a reasonable alternative to the Union's unrealistic initial demands. Rather than the Employer's reluctance to make concessions, it was the intransigence of the Union which made it impossible for the parties to reach agreement.

Embodied in the Judge's decision is his own subjective evaluation as to what would constitute a reasonable offer. Witness, for example, what the Judge through a proper wage increase should be: "Respondent's offer with regard to a wage increase was insufficient even to keep the employees abreast of the rise in the cost of living" (A. 642).

Apparently, the Judge is suggesting that any wage offer which falls below the rise in the cost of living must, of necessity, have been offered in bad faith. The Respondent's wage offer of 25¢, in reality, constituted a 6.25% increase based on the present wage scale of the Respondent. In order to comply with the Judge's standards, the Company would have had to have offered an 11% increase. Such a requirement is a gross misrepresentation of Section 8(d) of the Act.

It is evident that the Board has inferred that the Company was engaged in surface bargaining primarily because negotiations failed to produce a contract. It is submitted that if one carefully views the record as a whole, substantial evidence will illustrate that the language submitted by the Company, viewed with the economic offer made by the Company, was a fair and equitable one.

The entire record clearly shows that the Employer increased its economic offers when it was able to do so and was willing to discuss language proposals and reach an accord. The

Union, on the other hand, maintained an unrealistic posture and refused to negotiate on the terms of the contract unless the Company agreed to the Union's initial proposal. Accordingly, the finding that the Company committed an 8(a)(5) and 8(a)(1) violation premised on its failure to propose adequate contract terms and/or make concessions must be overturned for lack of adequate support in the record as a whole.

POINT II

THE BOARD'S CONCLUSION THAT THE
EMPLOYER VIOLATED SECTIONS 8(a)(1)
AND 8(a)(5) OF THE ACT IS CONTRARY
TO COURT AND BOARD PRECEDENT.

A. The Lack Of Substantial Evidence Is Clear.

This Court, when ruling upon the Board's findings of fact, must determine whether the evidence, viewing the record as a whole, substantially supports the Board's findings. Administrative Procedure Act, 5 U.S.C. Section 706 (1970). The standard of review laid down for the Court in cases such as this was explained in Universal Camera Corp. v. NLRB, 340 U.S. 474, 490 (1951). Therein the Supreme Court reversed and remanded an order of the Board that had found an employee to have been discharged for giving testimony in a prior case. Reviewing both the history of the Administrative Procedure Act and the Taft-Hartley Act, the Court stated in part:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act directs that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and

enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informal judgment on matters within its special competence or both." (Emphasis added)

In summary, that there be merely enough favorable evidence to convince a reasonable man that the facts are true is not sufficient. Instead, the favorable evidence must be such that viewing the record as a whole, including the contrary evidence, the findings of fact are supported by substantial evidence.

Thus, it is respectfully submitted that when this Court reviews all the evidence, including the contrary evidence, it will find that there is not enough evidence to support the Board's finding that the Company violated Sections 8(a)(5) and 8(a)(1) of the Act.

B. The Events Prior To April 1, 1975 Establish That The Company Was Engaged In Good Faith Bargaining.

Section 10(b) provides that no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge. However, as stated by the Supreme Court in Local Lodge No. 1424 v. NLRB, 362 U.S. 411, 417 (1960), conduct occurring more than six months prior to the filing of an unfair labor practice charge may be considered for the limited purpose of shedding light on events which are alleged to have violated the Act within the 10(b) period.

Mindful of the carefully circumscribed relevance of events outside 10(b), it is respectfully noted that the events prior to April 1, 1975 illustrate that the Company was engaged in good faith bargaining.

Neither Section 8(a)(5) nor Section 8(d) of the Act precludes an employer from engaging in bargaining of the type calculated to assure a favorable result. For approximately fourteen (14) months, the Employer and the Union met in honest negotiations. From almost the very outset of negotiations, the Employer made concessions and offered counter-proposals. It should be noted that the Company, through a series of proposals, made reasonable responses to each and every Union demand.

One of the principal issues in the negotiations involved a Union recognition clause and a proposed management rights clause. In Cartriseal Corp., 178 NLRB 272, (1969), the Board failed to find an 8(a)(5) violation where considerable time in negotiations was spent arguing whether the company's new address should be included in the contract and on the possibility of relocation. Except for economic issues, bargaining centered on management rights. The issues also focused on the employer's insistence on the unilateral right to subcontract. The employer maintained a consistent bargaining position on these issues throughout the negotiations.

In the instant case, the Employer was willing to meet and did meet with the Union at reasonable times, with reasonable frequency and for reasonable lengths of time. In spite

of the Union's claim of being bulldozed into accepting the timing of the negotiations, it is clear from substantial evidence, viewing the record as a whole, that the Union willingly joined or acquiesced in the scheduling of all the sessions. This is to be contrasted with Borg-Warner Controls, 198 NLRB 726, (1972), where the union attempted to secure earlier dates which the employer rejected. Here, the parties mutually agreed to the dates of negotiating sessions.

Some of the occasions, when significant periods of time passed between negotiating sessions, were clearly attributable to legitimate business considerations of either or both of the parties. The Union acquiesced in delays when it was not itself responsible for them. On other occasions, delays or short meetings were attributable to the Union as a result of Mr. Colavito having oral surgery, meeting his attorney, attending a Trustee's meeting and involvement with a seven month Association strike. The duty to bargain in good faith imposes a bilateral obligation to confer at reasonable times and intervals. The delays in bargaining were clearly not linked to any pattern of bad faith bargaining on the Employer's part. To the extent they can be attributed to one party, they can be attributed to the other as well. See Alcan Aluminum Corp., 214 NLRB No. 35, (1974); Holmes Typography Inc., 218 NLRB No. 64, (1975).

The parties met on numerous occasions. Substantial evidence on the record as a whole establishes that negotiating

sessions were conducted with a frequency acceptable to both parties. Without a doubt, the pace appeared to accommodate the Union's own schedule. Waycross Journal-Herald, Inc., 157 NLRB 1486, (1966).

With respect to the failure to turn over the items requested by the Union, Mr. Colavito's own testimony refutes this finding. 26/ He admitted that early in the negotiations he was given the present cost of both the Employer's pension and welfare programs. He also admitted receiving a copy of the pension trust agreement and the exact name and description of the welfare plan.

By December 1974, the Union had been given all the information it had requested and, therefore, the Company did not violate the Act in this regard. Inter-Polymer Industries, Inc., 196 NLRB 729, (1972); Newhouse Broadcasting Corp., 197 NLRB 885, (1972); Alkahn Silk Label Co., 193 NLRB 167, (1971). From that point forward, negotiations took place and measured

26/ All information requested by the Union was supplied promptly as soon as it was understood precisely what the request entailed. It is to be emphasized that many of the Union's requests were extremely difficult to decipher. As Mr. Tolmach aptly noted, "it was very difficult to understand what he was asking for a lot of the time" (A. 614) and "sometimes he made these statements and they were completely incongruous. I put it down, but he already had the information....He did this throughout negotiations. He either had a very short memory or he had a very poor filing system" (A. 615-616). As noted by the Board in Alkahn Silk Label Co., 193 NLRB 167 (1971) a failure to comply with a request for certain information may not be the result of "reticence on the part of the Company to supply information" but can result from the "ineptness of the Union representatives in describing what was wanted."

but meaningful progress was made. The Employer regularly met with the Union, supplied information, made proposals to each Union demand and reached agreement on a number of clauses. See Freeman Co., 194 NLRB 595, (1971).

The determination of good faith bargaining requires that all the circumstances of the negotiations be reviewed in their entirety. M.R. & R. Trucking Co., 434 F.2d 689, (5th Cir. 1970). 27/ Reviewing all the evidence, substantial evidence establishes that the Employer in this case was engaged in good faith bargaining.

C. Negotiations That Occurred After April 1, 1975 Establishes That The Company Was Engaged In Good Faith Bargaining.

The post-April 1, 1975 negotiations offer absolutely no evidence that the Employer did not continue to bargain in good faith. The information allegedly refused or delayed, had long since been turned over to the Union.

27/ As further evidence of the Employer's lawful intent in the instant proceeding is the fact that since July 22, 1977, the Employer has resumed good faith bargaining with Local 455 which had lawfully been halted at the September 30, 1975 negotiating session because of the September 23, 1975 filing of a decertification petition by the Company's employees. Admittedly compliance with a Board order does not render an enforcement proceeding moot. (National Labor Relations Board v. Mexia Textile Mills, Inc., 339 U.S. 563, (1950)). Nonetheless, it certainly illustrates that the Employer herein has possessed from the inception of the bargaining a lawful and good faith intent to reach agreement.

The pace of negotiations continued at the same rate as before. The Employer continued to meet at reasonable times and continued to make concessions as evidenced by its proposals and counter-proposals. All of the record evidence compels the conclusion that the Employer was bargaining in good faith with and honest intent to reach a final and binding agreement.

CONCLUSION.

The Board has failed to establish that the Employer unilaterally delayed or cut short negotiating sessions.

It has also failed to establish that the Employer did not comply with Union demands for information and that it did not evidence good faith in its contract proposals and/or concessions.

Wherefore, for all of the foregoing reasons, which illustrate that the Board's Order is not supported by substantial evidence, the Employer respectfully requests that it be set aside and that enforcement be denied.

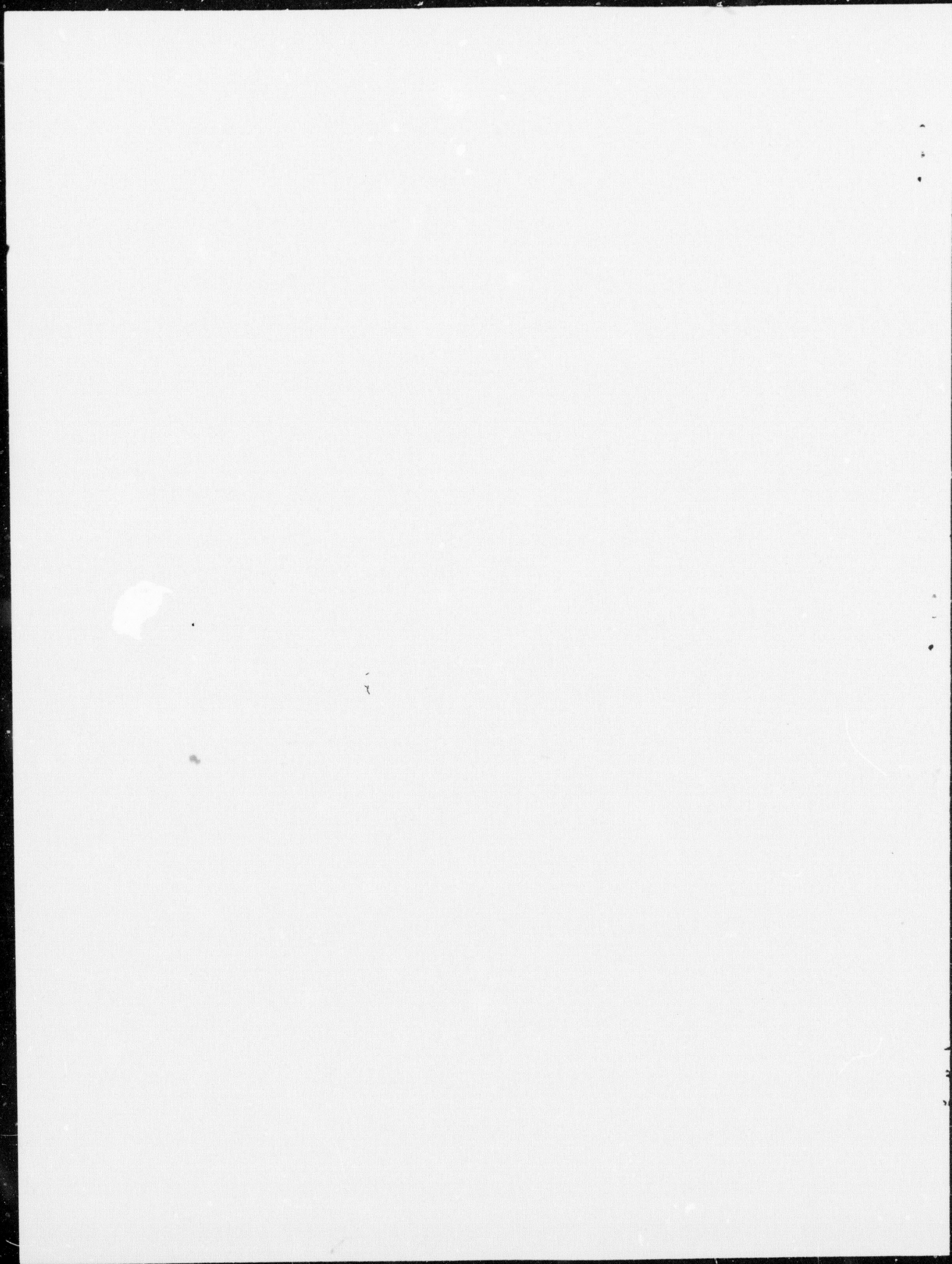
Respectfully submitted,

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Dated: New York, New York
September 23, 1977



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

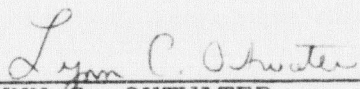
NATIONAL LABOR RELATIONS BOARD, :
:
Petitioner, : DOCKET NO. 77-4121
-v- :
MILGO INDUSTRIAL, INC., :
Respondent. :
:

CERTIFICATE OF SERVICE

The undersigned, Lynn C. Outwater, an attorney in the office of JACKSON, LEWIS, SCHNITZLER & KRUPMAN, attorneys for the Respondent, MILGO INDUSTRIAL, INC., hereby certifies that one copy of the Respondent's brief in the above-captioned case has this day been served by first class mail upon the following counsel at the addresses listed below:

National Labor Relations Board
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Attention: Elliott Moore

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LYNN C. OUTWATER

Dated: New York, New York
September 23, 1977